



The Draft Economic Growth (Regulatory Functions) (Amendment) Order 2024 & accompanying Statutory Guidance

Briefing on freshwater pollution impacts

Wildlife and Countryside Link ([Link](#)) is the largest environmental coalition in England, bringing together 83 organisations to use their joint voice for the protection of the natural world.

Executive summary

- The Government is imposing a new Growth Duty on Ofwat, requiring the regulator to have regard to desirability of promoting economic growth. This will:
 - Put Ofwat's economic regulatory focus out of kilter with the need for more robust environmental regulation to respond to freshwater pollution and other environmental harms caused by water companies.
 - Make it harder for Ofwat to take enforcement action against polluting water companies, as this could be construed as hindering the growth of those companies.
- The Growth Duty is to be imposed by the Draft Economic Growth (Regulatory Functions) (Amendment) Order 2024, laid before Parliament under the affirmative procedure on 06.03.24. The Order and accompanying Statutory Guidance are due to be considered by the Delegated Legislation Committee in the House of Commons in April. The House of Lords will consider both, and a motion of regret tabled by Baroness Bakewell of Hardington Mandeville, on 15th April.
- Link asks that parliamentarians press for the Order to be withdrawn and, failing that, for the accompanying draft Statutory Guidance to be significantly amended.
- Link also make the case for a Green Duty to replace the Growth Duty, to empower regulators to do more to sanction polluters and to ensure that regulatory decisions contribute to the achievement of targets set under the Climate Change Act 2008 and the Environment Act 2021.



Introduction

Sections 108 and 109 of the Deregulation Act 2015 give the Secretary of State power to impose a Growth Duty on regulators, requiring them “*have regard to the desirability of promoting economic growth*” when exercising their regulatory functions.¹

Following two consultations in 2023, in February the Government confirmed that the Growth Duty would be extended to Ofcom, Ofgem and Ofwat, with effect from April 2024, subject to Parliamentary approval of the necessary secondary legislation.² The Government has also published draft refreshed Statutory Guidance on how the Growth Duty should be applied, and has confirmed that it is working with stakeholders to develop a separate ‘Regulatory Performance Framework’, which will specify an approach to reporting.

A Statutory Instrument was laid before Parliament to impose the Growth Duty on Ofcom, Ofgem and Ofwat on 06.03.24, the Economic Growth (Regulatory Functions) (Amendment) Order 2024.³ The draft refreshed Statutory Guidance on applying the Duty has also been presented to Parliament.⁴ This briefing sets out the impact that the Order and Statutory Guidance will have on Ofwat and how it will hinder the regulator’s ability to help tackle freshwater pollution and potentially other sources of environmental harm such as from unsustainable levels of abstraction.

The Order shifts water regulation away from environmental considerations

Over recent years, as new data on the scale of freshwater pollution and unsustainable abstraction caused by water companies⁵ has emerged, there have been strong public and political calls for tighter regulation of the water industry to prevent environmental harm.⁶ The Government, or at the least the Department for the Environment, Food and Rural Affairs (Defra), had seemed responsive to this, with Defra’s April

¹ <https://www.legislation.gov.uk/ukpga/2015/20/section/108/enacted>

² <https://assets.publishing.service.gov.uk/media/65d611f2188d77001603883b/government-response-to-smarter-regulation-regulating-for-growth-consultation.pdf>

³ <https://www.gov.uk/government/publications/the-economic-growth-regulatory-functions-amendment-order-2024>

⁴ <https://assets.publishing.service.gov.uk/media/65f31f7efa18510011011765/draft-growth-duty-statutory-guidance.pdf>

⁵ For more on abstraction harms, see <https://www.wcl.org.uk/increase-resilience-to-drought-to-protect-people-and-nature.asp>

⁶ See for example: <https://lordslibrary.parliament.uk/river-pollution-and-the-regulation-of-private-water-companies/>



2023 Plan for Water pledging *“to address sources of pollution and boost our water supplies through more investment, tighter regulation, and more effective enforcement.”*⁷

However, the Order, introduced by the Department for Business and Trade (DBT) in March 2024, shifts the dial in the opposite direction, towards lighter regulation in the hope of boosting economic growth. The Growth Duty the Order applies is explicitly deregulatory, originating in an Autumn Statement 2012 commitment to *“make enforcement of non-economic regulation less burdensome”*⁸ and established under a Deregulation Act designed to *“make provision for the reduction of burdens resulting from legislation for businesses or other organisations.”*⁹

Framing non-economic regulation as a burden on business rarely spells good news for the environment.¹⁰ Concerns on these grounds were raised when the Government first introduced the Growth Duty powers as part of the Deregulation Act. Speaking at Commons 2nd reading of the Deregulation Bill in 2014, then Chair of the Environmental Audit Committee Joan Walley MP said:

“My biggest objection to the Bill is the duty to achieve economic growth as set out in clauses 61 to 64....Insufficient regard seems to have been given to environmental appraisal throughout the clauses, and I wonder how the Government can square clause 61 with guidance from their own Natural Capital Committee.”

Caroline Lucas MP shared those concerns, saying of the Growth Duty:

*“I fear that it will interfere with, and impinge on, the ability of organisations to play crucial roles...it seems to me that an obsession with short-term GDP growth at any cost is simply not in the public interest.”*¹¹

A decade on, the Order reflects its deregulatory provenance, requiring Ofwat to *“have regard to the desirability of promoting economic growth in all of its regulatory activities.”*¹²

It is fundamentally difficult to see how the imposition of a Growth Duty designed to lighten the ‘burden’ of regulation on the water industry by DBT is compatible with Defra’s commitment to tighten regulation on the same industry. The House of Lords Secondary Legislation Committee put this question to DBT in

⁷ <https://www.gov.uk/government/publications/plan-for-water-our-integrated-plan-for-delivering-clean-and-plentiful-water/plan-for-water-our-integrated-plan-for-delivering-clean-and-plentiful-water>

⁸ https://assets.publishing.service.gov.uk/media/5a7c9a3b40f0b65b3de09f36/autumn_statement_2012_complete.pdf p76

⁹ <https://bills.parliament.uk/bills/1338#:~:text=Long%20title,functions%3B%20and%20for%20connected%20purposes>.

¹⁰ https://www.wcl.org.uk/docs/What_price_deregulation_Link_briefing_12_12_22.pdf

¹¹ <https://hansard.parliament.uk/Commons/2014-02-03/debates/1402032500001/DeregulationBill>

¹² https://www.legislation.gov.uk/ukdsi/2024/9780348258745/pdfs/ukdsi_9780348258745_en.pdf



March 2024, being informed in response that “*the Growth Duty will not take precedence over other duties.*”¹³ This fails to provide much assurance. A deregulatory duty does not need to take precedence to have a deregulatory effect, simply by being added to existing duties it tips the balance further towards deregulation, and away from tighter regulation designed to address the source of environmental pollution.

This shifting of the dial of water regulation away from environmental objectives is:

- **Unnecessary:** As an economic regulator, Ofwat already gives considerable attention to financial costs and economic growth. Paragraph 1 of the Regulators’ Code¹⁴ already requires Ofwat to consider how it can support or enable economic growth, making the Growth Duty an unnecessary duplication.
- **Contrary to the advice of key Parliamentary committees:** Both the Environmental Audit Committee in the Commons¹⁵ and the Industry and Regulators Committee in the Lords¹⁶ have recommended in recent reports that Ofwat be given stronger guidance to regulate for environmental objectives. The imposition of the Growth Duty and the closer alignment of water regulation to economic concerns runs directly contrary to these recommendations.
- **Contrary to public opinion:** Public support for tighter regulation to address freshwater pollution is well documented;¹⁷ polls show 80% support for banning the payment of dividends to the shareholders of polluting water companies.¹⁸ Requiring the regulator to consider economic growth before making such decisions is likely, at the very least, to make action on dividends on environmental grounds heavily contested (see more on this below). The scale of public concern about water pollution, and the possibility of the Order making policy responses to that concern more difficult, is the reason why the Secondary Legislation Committee decided to draw the Order to the special attention of the House of Lords in March 2024.¹⁹

In summary, the Order introduced by DBT constitutes a ratchet away from environmental objectives in water regulation, running contrary to both the stated objectives of Defra and the public demand for stronger environmental regulation in the water sector.

¹³ <https://publications.parliament.uk/pa/ld5804/ldselect/ldsecleg/87/87.pdf>

¹⁴ <https://www.gov.uk/government/publications/regulators-code>

¹⁵ <https://committees.parliament.uk/work/891/water-quality-in-rivers/publications/>

¹⁶ <https://publications.parliament.uk/pa/ld5803/ldselect/ldindreg/166/16602.htm>

¹⁷ <https://riveractionuk.com/healthy-rivers-are-an-influential-voting-issue-for-almost-half-of-british-public/>

¹⁸ <https://www.thetimes.co.uk/article/clean-it-up-ban-polluting-water-companies-from-handing-out-dividends-public-say-3vx6x8998>

¹⁹ <https://publications.parliament.uk/pa/ld5804/ldselect/ldsecleg/87/87.pdf>



The Statutory Guidance will make it more difficult to take enforcement action against water companies

The draft refreshed Statutory Guidance for the Growth Duty sets out exactly how Ofwat should implement the Order and its requirement on the regulator to:

“Give appropriate consideration to the potential impact of their activities and their decisions on economic growth, for the wider UK economy, alongside or as part of their consideration of their other statutory duties.” (p4)

This detailed application guidance suggests that the deleterious impact of the Growth Duty on efforts to combat freshwater pollution will go beyond tilting the balance of regulation away from environmental factors, to actively making enforcement action against polluting water companies more difficult.

The Statutory Guidance is explicit that the Growth Duty should be closely applied when enforcement action is contemplated, highlighting that:

“Certain enforcement actions, and other activities of the regulator, can be particularly damaging to growth. These include, for example, enforcement actions that limit or prevent a business from operating; financial sanctions; and publicity, in relation to a compliance failure, that harms public confidence.” (p28)

As such, before taking enforcement action, regulators are guided to consider the:

“Likely impact of the proposed intervention on the business, and the wider business community both in terms of remedying and deterring the noncompliance and in terms of economic costs and benefits to businesses.” (p29)

In the context of the sewage scandal²⁰, and the public outrage over the March 2024 storm overflow pollution figures²¹, this is extraordinary guidance for the regulator that oversees water companies. It could have a chilling effect on Ofwat enforcement action, as it would allow water companies to challenge enforcement as the imposition of undue economic costs, or even point to the harm action would cause to public confidence in their business. Water companies have not been shy about using every available route to challenge Ofwat in the past.²² The Statutory Guidance to apply the Growth Duty introduced by the Order provides water companies with a new tool to push back against robust regulatory action.

²⁰ <https://www.sas.org.uk/water-quality/water-companies-shocking-stats/>

²¹ <https://theriverstrust.org/about-us/news/2023s-sewage-deluge>

²² See for example: <https://www.ofwat.gov.uk/regulated-companies/price-review/2019-price-review/regulated-companies-price-review-2019-price-review-competition-and-markets-authority-referrals/>

Indeed, it is conceivable that the Growth Duty, as applied by the Statutory Guidance, could be used to frustrate efforts to give Ofwat new powers to prevent polluting water companies from paying bonuses to executives. This policy reform, proposed over recent years by Labour²³, the Liberal Democrats²⁴ and the Greens²⁵, was green-lit by the Government in February, with an Ofwat consultation on the detail of banning bonuses payments in polluting companies due to start soon.²⁶ A ban on bonuses is a financial sanction, which the Statutory Guidance states can be “*particularly damaging*” to growth. A case could be made that Ofwat would breach its Growth Duty if it implemented such a potentially growth damaging policy. Yet more robust action, such as a ban on polluting companies paying dividends to shareholders, could also be subject to challenge or delay in the light of the new duty.

Link concerns about the effect of the Statutory Guidance on enforcement were put to DBT by the Secondary Legislation Committee. In response, DBT said that the Statutory Guidance “*sets out that regulators should ensure that enforcement action is always proportionate and considers the needs of businesses. However, the guidance does not in any way set restrictions on regulators as to how their enforcement can and should operate.*”²⁷ Again, this fails to provide much assurance. Outright restriction is not the only way to stymie enforcement action, increased complexity (especially for regulators facing continuing resourcing constraints) and heightened risk of legal challenge can have much the same effect.²⁸ It also notable that DBT failed to provide any specific assurance as to the impact of the Statutory Guidance on the ban on bonuses proposed by Defra, merely stating that “*the policy on bonus restrictions is subject to consultation and we would encourage all interested parties to respond to any future consultations on bonus restrictions.*”²⁹

The Statutory Guidance contains other concerning elements. It encourages “*consideration of reviews to streamline, relax, revoke or remove rules*” (p28) and urges “*speed of decision making*” (p19), including proposed targets for processing regulatory approvals at speed (p30), as ways to comply with the Growth Duty. The last thing struggling freshwater habitats³⁰ need is the relaxation or revocation of rules designed to prevent pollution. Similarly, without first addressing the significant resource and funding gap regulators

²³ <https://labour.org.uk/updates/press-releases/labour-will-empower-water-regulator-to-ban-bosses-bonuses-until-they-clean-up-their-filth/>

²⁴ <https://www.libdems.org.uk/press/release/ofwat-on-exec-pay-toothless-regulator-needs-to-ban-bonuses>

²⁵ <https://www.greenparty.org.uk/news/2022/08/09/greens-call-for-action-on-water-companies-as-england-faces-heat-health-alert-and-drought/>

²⁶ <https://www.gov.uk/government/news/government-cracks-down-on-bonuses-for-water-company-bosses>

²⁷ See full DBT response to Link questions put by Secondary Legislation Scrutiny Committee: <https://committees.parliament.uk/publications/43965/documents/217840/default/>

²⁸ For examples, see <https://unchecked.uk/the-issue/our-environment/>

²⁹ <https://publications.parliament.uk/pa/ld5804/ldselect/ldsecleg/87/87.pdf>

³⁰ For more on the poor state of England’s freshwaters, see the recent ‘State of our Rivers’ report from The Rivers Trust: <https://theriverstrust.org/key-issues/state-of-our-rivers>



still face³¹, targets to increase speed risk undermining the rigour of regulatory processes and their efficacy against freshwater pollution.

A section on environmental sustainability as a driver of economic growth (p21 & 22) has been included in the Statutory Guidance. This is a welcome response to strong representations made from environmental organisations at consultation stage.³² However, this section fails to set a clear requirement for regulators to directly contribute to economically essential³³ net zero and nature recovery goals. Instead, the section proposes a series of marginal, barely environmental measures such as setting “*efficiency targets to reduce business costs*”. It provides a muddled and incomplete articulation of environmental sustainability as a driver of economic growth, which fails to offset the environmentally harmful steers elsewhere in the Guidance. This is in stark contrast to the specificity and clarity of the requirement, earlier in the Guidance, for the regulator to closely consider the economic impact of enforcement action upon the subject business before taking action.

Concerningly, the refreshed guidance would also apply to other organisations already subject to the Growth Duty, including the Environment Agency. It could create a chilling effect across a range of environmental enforcement activities.³⁴

The Order should be opposed and the Statutory Guidance amended

In sum, the imposition of a Growth Duty on Ofwat by the Order, and the Statutory Guidance that will apply it, will tilt the balance of water regulation further away from environmental considerations and make sanctions harder to impose on water companies that pollute or cause other environmental harms such as unsustainable levels of abstraction. All of these changes are likely to make freshwater pollution, already at stubbornly high levels³⁵, worse rather than better.

In line with the public demand for water regulation to become more environmentally focused, plans to apply the Growth Duty to Ofwat should be scrapped. This would preserve Ofwat’s current capability to

³¹ https://www.wcl.org.uk/docs/assets/uploads/The_state_of_pollution_in_rivers_Briefing_note_Feb_2024_1.pdf (p4-5)

³² See https://www.wcl.org.uk/docs/WCL_Response_Growth_Duty_Extension_Consultation_17_08_2023.pdf & https://www.wcl.org.uk/docs/WCL_Response_Growth_Duty_Draft_Statutory_Guidance_Consultation_Jan_2024.pdf

³³ <https://www.wcl.org.uk/docs/EAC%20Inquiry%20on%20natural%20capital%20-%20Link%20response%20-%202022.09.23.pdf> (p2)

³⁴ For more on the detrimental impact the Growth Duty has already had on the Environment Agency, see <https://www.endsreport.com/article/1866784/impact-will-ofwats-growth-duty-enforcement>

³⁵ https://www.wcl.org.uk/docs/assets/uploads/The_state_of_pollution_in_rivers_Briefing_note_Feb_2024_1.pdf (p1&2)



take enforcement action against polluting water companies, a key (but not the sole³⁶) contributor to the pollution harming England's freshwaters. As such, **Link asks parliamentarians:**

- **To oppose the Draft Economic Growth (Regulatory Functions) (Amendment) Order 2024**, when it comes before the Delegated Legislation Committee (Commons) and the Lords in April 2024. The motion to regret tabled by Baroness Bakewell of Hardington Mandeville in the Lords for 15.04.24 has Link's full support.³⁷ If this opposition fails to persuade the Government to withdraw the SI, then:
- **To demand the redrafting of the Statutory Guidance accompanying the order**, including the removal of the most environmentally damaging elements on sanctions, the revocation of regulations and speed of processing. Redrafted guidance should also make clear that environmentally sustainable economic growth means growth that is compatible with meeting the objectives of the Environment Act 2021 and the Climate Change Act 2008 and that regulators' actions and decisions should support economic activity where it is compatible with those objectives.

Going further: Replacing the Growth Duty with a Green Duty

We also ask Parliamentarians to consider going further and supporting a strong Green Duty for regulators.

Such a Green Duty would require regulators to contribute, wherever possible, to the delivery of environmental targets under the Environment Act 2021 and the Climate Change Act 2008, explicitly linking work of regulators to the delivery of legally-binding, measurable Government targets. This would be a cost-free governance change that would bring key public bodies (such as Ofwat, the Forestry Commission and the Marine Management Organisation) up to date, and align them in support of the Government's environmental objectives.

By contributing towards the delivery of these targets, and thereby the restoration of the natural capital our economy relies on, public bodies and regulators would promote sustainable growth and enhance economic resilience. This would also help ensure that cost-effective and efficient opportunities for green growth, such as investment in nature-based solutions, are not missed. There is a funding gap of more than £19 billion in the UK for nature recovery when comparing existing funds and Government objectives, which increases to £44 billion for all nature-related objectives.³⁸ Private sector finance will be vital to

³⁶ https://www.wcl.org.uk/docs/assets/uploads/The_state_of_pollution_in_rivers_Briefing_note_Feb_2024_1.pdf

³⁷ <https://lordsbusiness.parliament.uk/?businessPaperDate=2024-04-15>

³⁸ <https://www.greenfinanceinstitute.com/wp-content/uploads/2021/10/The-Finance-Gap-for-UK-Nature-13102021.pdf>



addressing this investment gap for nature, and the contribution that regulated industries could make to this target is substantial.

A Green Duty applied to Ofwat would clarify its role as an environmental regulator, and the weight that environmental costs and benefits should have in its decision-making. This would empower Ofwat to regulate the water industry with more rigour than it can currently apply. Regulators should have to have the powers effectively punish companies who damage the environment. Given the scale of pollution in the freshwater environment, Ofwat’s environmental powers should be increased through a Green Duty, not curtailed through imposition of the Growth Duty.

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This briefing is also supported by the following organisations belonging to the Wildlife & Countryside Link coalition:

Angling Trust

Friends of the Earth (England, Wales and Northern Ireland)

Institute of Fisheries Management

Marine Conservation Society

River Action

The Rivers Trust

Surfers Against Sewage

Waterwise